UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ROBERT D. GWIN, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	CASE NO. C16-11-MJP ORDER DENYING MOTIONS TO VACATE, SET ASIDE, OR CORRECT SENTENCE UNDER 28 U.S.C. § 2255

THIS MATTER comes before the Court on pro se Petitioner Robert D. Gwin's Motions to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255. (Dkt. Nos. 1, 11.) Having considered the Parties' briefing (Dkt. Nos. 1, 6, 8, 9, 10, 11) and the related record, the Court hereby DENIES the Motions for relief. A certificate of appealability is DENIED.

Background

On September 19, 2002, Petitioner Robert D. Gwin was sentenced to a 387-month prison term and five years of supervised release following his convictions for Carrying a Firearm in Commission of a Drug Trafficking Crime, Possession of a Firearm as a Convicted Felon, and Possession of Cocaine Base with Intent to Distribute. As part of its sentencing calculations, the

Court determined that Mr. Gwin was a career offender based on two Washington state convictions—a 1993 conviction for Unlawful Delivery of a Controlled Substance (Cocaine) and a 1990 conviction for Assault in the Second Degree with a Deadly Weapon—and sentenced him accordingly.

Mr. Gwin now moves to vacate, set aside, or correct his sentence in light of the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015). (Dkt. Nos. 1, 8, 10, 11.) First, Mr. Gwin contends that the two Washington state convictions that rendered him a career offender can no longer serve as career offender predicates under the so-called residual clause of USSG § 4B1.2(a)(2) following Johnson, which invalidated the identically-worded residual clause in the Armed Career Offender Act ("ACCA") as unconstitutionally vague. Second, Mr. Gwin argues that because his assault conviction resulted from Washington's version of an Alford plea, it cannot serve as a career offender predicate following United States v. Williams, 741 F.3d 1057, 1059 (9th Cir. 2014) and United States v. Alston, 611 F.3d 219 (4th Cir. 2010), which Mr. Gwin argues preclude a sentencing court from relying on convictions obtained by Alford pleas when adjudicating a defendant as a career offender. Third, Mr. Gwin argues his trial attorney was ineffective for not raising this Alford-based objection at sentencing. Finally, Mr. Gwin argues that Washington's second degree assault statute is overbroad and not "divisible" within the meaning of Descamps v. United States, 133 S. Ct. 2276 (2013), and thus his assault conviction cannot qualify as a crime of violence under the modified categorical approach recognized in Taylor v. United States, 495 U.S. 575 (1990).

The government opposes Mr. Gwin's Motions. (Dkt. Nos. 6, 9.)

As discussed below, the Court concludes that Mr. Gwin's Motions must be DENIED.

Discussion

I. Johnson v. United States and Residual Clause of USSG § 4B1.2(a)(2)

Mr. Gwin first argues that the two Washington state convictions that rendered him a career offender can no longer serve as career offender predicates under the so-called residual clause of USSG § 4B1.2(a)(2) following Johnson, which invalidated the identically-worded residual clause in the Armed Career Offender Act ("ACCA") as unconstitutionally vague. The government argues that Johnson's impact on the Career Offender Guidelines is irrelevant in this case because the Court did not rely on the residual clause in finding that Mr. Gwin's prior convictions qualified him as a career offender. (Dkt. No. 6 at 11-12.) The Court agrees.

USSG § 4B1.2 provides in relevant part:

> (a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.
> (b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Mr. Gwin's conviction for unlawful delivery of cocaine is a controlled substance offense, and its status as a career offender predicate is not impacted by USSG § 4B1.2(a)(2)'s residual clause. And, as the Ninth Circuit has determined, Mr. Gwin's conviction for second degree assault with a deadly weapon under RCW 9A.36.021(1)(c) is categorically a crime of violence as defined in USSG § 4B1.2(a)(1) because under Washington law, all instances of assault with a deadly weapon "have as an element the 'use, attempted use, or threatened use of physical force

against the person of another.'" United States v. Jennen, 596 F.3d 594, 600-02 (9th Cir. 2010). Because USSG § 4B1.2(a)(1), as opposed to USSG § 4B1.2(a)(2), does not have a residual clause, the constitutionality of the residual clause has no impact on Mr. Gwin's status as a career offender.

In sum, Johnson is not applicable to Mr. Gwin's case. Because Mr. Gwin's predicates did not arise under the so-called residual clause, and instead arose under other portions of the Career Offender Guidelines, he is not entitled to relief on this basis.

II. Alford Plea as Career Offender Predicate and Ineffective Assistance

Next, Mr. Gwin contends that because his assault conviction resulted from Washington's version of an Alford plea, it cannot serve as a career offender predicate following United States v. Williams, 741 F.3d 1057, 1059 (9th Cir. 2014) and United States v. Alston, 611 F.3d 219 (4th Cir. 2010), which Mr. Gwin argues preclude a sentencing court from relying on convictions obtained by Alford pleas when adjudicating a defendant as a career offender. The Court disagrees.

First, this claim for relief is time barred because it was not filed within the one-year limitation period as provided by 28 U.S.C. §§ 2255(f)(1)-(4) and is now procedurally defaulted. Second, even if it were not time barred and procedurally defaulted, this claim is meritless. A defendant's status as a career offender turns on whether he "has at least two prior felony convictions for either a crime of violence or a controlled substance offense," not whether he actually committed those predicate crimes. USSG § 4B1.1(a) (emphasis added); see also United States v. Guerrero-Velasquez, 434 F.3d 1193, 1197 (9th Cir. 2006) ("Whether or not a defendant maintains his innocence, the legal implications of a guilty plea are the same in the context of the modified categorical approach under Taylor. The question under the sentencing guidelines is

whether a defendant has 'a conviction for a ... crime of violence,' not whether the defendant has admitted to being guilty of such a crime.") (citation omitted). United States v. Williams does not compel a contrary result. Williams, 741 F.3d at 1060 ("One can be convicted of a crime without having actually committed it, as may be the case with Alford and nolo contendere pleas…."). As discussed above, Mr. Gwin was convicted of second degree assault with a deadly weapon, a predicate crime of violence under USSG § 4B1.2(a)(1). The fact that the conviction resulted from an Alford plea, and that Mr. Gwin refused to admit guilt as to all of the elements, does not negate that he was, in fact, convicted of that offense.

Because there was nothing wrong with the Court's use of an Alford-based conviction in this fashion, neither trial nor appellate counsel were ineffective for failing to object on this basis. See Baumann v. United States, 692 F.2d 565, 572 (9th Cir. 1982) ("The failure to raise a meritless legal argument does not constitute ineffective assistance of counsel.").

The Court finds that Mr. Gwin is not entitled to relief on these bases.

III. Divisibility under Descamps v. United States

Lastly, Mr. Gwin contends that he is entitled to relief because Washington's second degree assault statute is overbroad and not "divisible" within the meaning of Descamps v. United States, 133 S. Ct. 2276 (2013), and thus his assault conviction cannot qualify as a crime of violence under the modified categorical approach recognized in Taylor v. United States, 495 U.S. 575 (1990). The Court disagrees.

As with Mr. Gwin's Alford-based claims, this claim is time barred and procedurally defaulted. Even if it were not, however, it would still fail. As discussed above, the Ninth Circuit has expressly held that "Washington's crime of second degree assault with a deadly weapon is categorically a crime of violence." Jennen, 596 F.3d at 600. Because this conviction is

categorically a crime of violence, the Court's "'inquiry is complete'" and there is no need to "apply the modified categorical approach." United States v. Melchor-Meceno, 620 F.3d 1180, 1183 (9th Cir. 2010) (quoting United States v. Grajeda, 581 F.3d 1186, 1189 (9th Cir. 2009)). And, because the modified categorical approach is not applicable here, Descamps v. United States, 133 S. Ct. 2276 (2013), is likewise inapplicable. Accordingly, the Court concludes that Mr. Gwin has not established an entitlement to relief on this basis.

IV. Certificate of Appealability

28 U.S.C. § 2253(c)(2) provides that a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." To satisfy this standard, petitioners must show "that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" Slack v. McDaniel, 529 U.S. 473, (2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)). To make such a showing, a petitioner must demonstrate "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotation marks and citation omitted).

The Court finds that Mr. Gwin has failed to make the showing required in order to be entitled to a certificate of appealability on any of the issues presented in his Motions. Accordingly, a certificate of appealability is DENIED.

Conclusion

The Court finds that Mr. Gwin has not met his burden to prove by a preponderance of the evidence the existence of an error rendering his conviction or sentence unlawful. See Simmons

v. Blodgett, 110 F.3d 39, 42 (9th Cir. 1997). Therefore, Petitioner's Motions to Vacate, Set Aside or Correct Sentence pursuant to 28 U.S.C. § 2255 are DENIED. (Dkt. Nos. 1, 11.) A certificate of appealability is DENIED.

The clerk is ordered to provide copies of this order to Petitioner and to all counsel.

Dated this 8th day of July, 2016.

Marsha J. Pechman
United States District Judge